83 - 1741

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HYUN JOON CHUNG and
YANG JA CHUNG,

Petitioners,

vs.

IMMIGRATION AND
NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the term "extreme hardship" in 8 U.S.C. 1254(a)(1) constitutes a fixed and ascertainable standard not violative of due process of law under the Fifth Amendment of the United States Constitution.
2. Whether persons presenting similar circumstances in application for discretionary relief under 8 U.S.C. 1254(a)(1) are subjected to arbitrary discrimination resulting in denial of due process of law.

PARTIES TO THIS PROCEEDING

Hyun Joon Chung and Yang Ja Chung were Petitioners in the court below and are now Petitioners in this Court. Immigration and Naturalization Service was Respondent in the court below and is now Respondent in this Court. There are no known interested parties other than those listed in this Petition.

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

HYUN JOON CHUNG and YANG JA CHUNG,

Petitioners,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioners, Hyun Joon Chung and Yang Ja Chung, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this case on December 2, 1983, rehearing denied on January 26, 1984.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit holding that the discretion vested in the Board of Immigration Appeals was not abused in the determination of "Extreme hardship" in applications for suspension of deportation under 8 U.S.C. 1254(1)(a) is attached hereto as Appendix A.

JURISDICTION

Petitioners were Appellants in this case in the Ninth Circuit below. The opinion and judgment was entered on December 2, 1983. Petitioners' Petition for Rehearing in the Ninth Circuit Court of Appeals was denied on January 26, 1984. This petition is timely filed within 90 days of that date. (28 U.S.C. 1254(1)). The order denying rehearing

is set forth in Appendix B. This court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States Amendment 5 — Appendix C
2. 8 U.S.C. 1254(1)(a) — Appendix D

STATEMENT OF THE CASE

Appellants entered the United States in 1968 as treaty traders under a Treaty of Commerce between the United States and the Republic of Korea. They have resided in the County of Los Angeles, State of California since their initial entry and have demonstrated themselves to be persons of good moral character engaged in substantial business in the United States since that time.

Appellants, husband and wife, have five children, four of them were born in the United States, and all reside together as a family unit.

In deportation proceedings, the appellants made application for suspension of deportation under 8 U.S.C. 1254 (a)(1).

It was developed in hearings before an immigration judge that the wife suffered from a medical condition for which more effective treatment was available in the United States but not in Korea. Evidence was also presented that the four United States citizen children would have difficulty adjusting to Korea language, schools, and culture. They also showed evidence of business and real property interests in the United States which would require forced

liquidation if suspension of deportation were not granted.

On February 26, 1982, the immigration judge denied the applications for suspension of deportation finding that hardship had not been established. He found wife's medical condition was manageable with medical facilities in Korea and that deportation would not result in extreme hardship to the children. In denying the applications, consideraable comment was made upon certain adverse factors found against appellants including a deceitful course of conduct in gaining initial entry to the United States and what was termed the "shady business" of employing illegal aliens in their businesses.

The Board of Immigration Appeals

dismissed the appeal. The United States Court of Appeals for the Ninth Circuit affirmed and denied rehearing.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

WHETHER THE TERM "EXTREME HARDSHIP" IN 8 U.S.C. 1254(a)(1) CONSTITUTES A FIXED AND ASCERTAINABLE STANDARD NOT VIOLATIVE OF DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Section 244(a)(1) of the Immigration and Nationality Act of 1952 authorized suspension of deportation where an alien can demonstrate "exceptional and extremely unusal hardship" to himself or to a lawful permanent resident or citizen spouse, parent, or child. (Act of June 27, 1952, Ch.477,66 Stat.163,214)

In 1962 Congress changed the requirement of "exceptional and extremely

unusual hardship" to the current requirement of "extreme hardship", presumably to lessen the degree of hardship required. (Act of October 24, 1962, Pul L. No. 87-885, 76 Stat. 1248)

> Section 244 of the Immigration and Nationality Act, 8. U.S.C. 1254(a)(1)(1976) currently provides:
>
> (a)'As hereinafter presented in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien alwfully admitted for permament residency, in the case of an alien who applies to the Attorney General for suspension of deportation and-
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a

citizen of the United States or an alien lawfully admitted for permanent residence...

Various courts have noted the difficulty in defining the term "extreme hardship". Banks v. INS, 594 F.2d 760, 762 (9th Cir. 1979); Urbano de Malaluan v. INS, 577 F.2d 589,595 (9th Cir.1978). This court has recognized that "these words are not self-explanatory and reasonable men could easily differ as to their construction." INS v. Wang, 450 U.S. 139,144(1981)

To begin with, the alien must base a claim of extreme hardship to himself or his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. However, the presence of a single factor in itself will not

necessarily warrant a finding of extreme hardship. The courts have normally refused to find extreme hardship present where the claim is based primarily upon economic detriment (e.g.,Bueno-Carrillo -v-Landon, 682 F2d 143(7th Cir. 1982)), or solely upon the existence of United States citizen children (e.g.,Chiaramoute v. INS, 626 F.2d 1093,1100 (2d Cir.1980). A contrasting case, however, rules that extreme hardship may exist where a grandparent and grandchild relationship resembles a parent-child relation, Tovar v. INS, 612 F.2d 799 (3rd Cir. 1980) Clearly, the standard is unclear and ambiguous at best.

Consistent with the legislative history of Section 244(a)(1), courts in more recent decisions construed that

provision liberally to effectuate its ameliorative purpose as relief from the drastic result of deportation and its attendant consequences of uprooting and displacement. (see the excellent summary of cases in 2 Gordon and Rosenfeld, Immigration Law & Procedure, Section 7.9d(5)(rev.ed.1982). The Court of Appeals for the Ninth Circuit followed this construction in Wang v. INS, supra, but was reversed by this court. 622 F. 2d 1341 (9th Cir. 1980), rev'd, 450 U.S. 139 (1981).

The court refused to apply a liberal construction to the term "extreme hardship" and instead found that the construction of extreme hardship was within the province of the Attorney General subject to review only upon an abuse of

discretion standard.

Courts since Wang have found abuse of discretion when reviewing determinations of extreme hardship where there has been a failure to consider all relevant aspects of an individuals claim (Mejia-Carillo v. INS, 656 F.2d 520,522 (9th Cir. 1981), or where there has been apparent undue influence by factors tangential to the statutory requirements for eligibility, Santana-Figueroa v. INS, 644 F.2d, 1345, 1356 n.2 (9th Cir. 1981). The various circuits now differ widely in the construction of "abuse of discretion", the application of different standards giving rise to inconsistent results.

The Sixth Circuit has construed Wang narrowly holding that consideration of

hardship to a citizen child separate from the hardship of economic loss, and failure to consider the factors cumulatively was not an abuse of discretion. Balani v. INS, 669 F.2d 1157 (6th Cir. 1982)

The Third Circuit reached the opposite conclusion in Ravancho v. INS, 658 F. 2d 169 (3d Cir. 1981) holding that separate rather than cumulative consideration of each factor consituted abuse of discretion.

Although the Ninth Circuit has without doubut been the most liberal in its construction of "abuse of discretion", petitioners submit that there has been an absence of consistency within its own decisions. Petitioners brought to the attention of the Ninth Circuit in a

Petition for Rehearing the inconsistency between its position in Santana-Figueroa v.INS,(supra, at 1356) that abuse of discretion will be found when the Attorney General's determination has been unduly influenced by factors tangential to statutory requirements of eligiblity, and its failure to apply the same rule to the instant case. A copy of the Petition for Rehearing is attached hereto as Appendix E.

Petitoners contend that the terms "extreme hardship" and the standard of review of "abuse of discretion" as presently applied by courts in applications for suspension of deportation are ambiguous, vague, and provide no ascertainable standard, and is accordingly violative of due process of laws

contrary to the Fifth Amendment of the United States Constitution.

Petitioners throughout the course of the proceedings below have been denied basic guidence as to the appropriate standards to be applied to their application for suspension of deportation and consequently denied the opportunity to present the relevant factors of their case most effectively .

The absence of a clear and concrete standard has further resulted in an abuse of discretion on the part of the Attorney General which abuse of discretion has escaped the review of the Ninth Circuit due to the lack of guidence that court has been provided on applicable standards.

II.

WHETHER PERSONS PRESENTING SIMILAR CIRCUMSTANCES IN APPLICATION FOR DISCRETIONARY RELIEF UNDER 8 U.S.C. 1254(a)(1) ARE SUBJECTED TO ARBITRARY DISCRIMINATIN RESULTING IN DENIAL OF DUE PROCESS OF LAW

The lack of a clear standard in the determination of extreme hardship in applications for suspension of deportation results in arbitrary discrimination between persons in similar circumstances. This is a denial of due process of law. United States Constitution Amendment Five; Wallace -v- Currie 95 F.2d 856 reversing Currie v. Wallace, 19 F. Sup. 11 and cert. granted 305 U.S.84, affirmed 306 U.S. 1.

In Phinpathya v INS, 673 F. 2d 1013 (9th Cir. 1981), the Attorney General rejected the alien's claim that his

deportation would cause extreme hardship to his epileptic child. The Ninth Circuit reversed on the basis that the Attorney General had concentrated on whether there was adequate medical care available in Thailand but did not consider the hardship that travel and uprooting would impose on the child. The failure to consider hardship beyond the adequacy of medical services in Thailand was held an abuse of discretion.

In the instant case there is a similar failure to consider the hardship that travel and uprooting will impose on not one but four United States citizen children of petitioners. No where in either the opinions of the immigration judge or the Board of Imm-

igration Appeals can be found a discussion of hardship that would be imposed on the children, either by itself or cumulatively with any other factor of hardship, except for the Board's debatable reference to the young age of the children allowing an easier adjustment to living in Korea (the oldest child was thirteen years of age at the time). No abuse of discretion, however, was found.

In the case of Chung v. INS, 602 F.2d 608 (3d Cir. 1979) cited with approval in Santana-Figueroa, (supra, at note 2), it was held that there is an abuse of discretion where the hardship determination is unduly influenced by factors not germane to the eligibility requirements for suspension of

deportation as set forth in the statute. The alien in that case had been a recipient of public assistance which fact had been cited by the Attorney General as an adverse factor in the extreme hardship determination. The court quite correctly pointed out that it is in the Attorney General's discretion to determine the factors of hardship to the applicant, but not to take into consideration the state's interest in who should be and who should not be worthy or desirable beneficiaries of administrative discretion.

As has been argued extensively in the petition for rehearing below (Appendix E), similar abuse of discretion occured in the instant case. The immigration judge relied heavily upon

certain adverse factors cited making only cursory, summary, and non-explanatory references to the alleged hardships. Those adverse factors were in no way related to the requirements for suspension of deportation, however, again no abuse of discretion was found.

Petitioners submit that they are victims of arbitrary discrimination as the result of the lack of uniformity in the standards applied by different courts. The only remedy available to petitioners is a writ of certiorari issued to review the judgment below.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court grant a writ of certiorari and set aside the Judgment of the Court of Appeals.

Dated: April 24, 1984

Respectfully submitted,

David Y. Kim
Attorney for
Petitioners

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 82-7723

I&NS Nos.

A19 083 530
A19 083 532

OPINION

Petition for Review of a Decision of the Board of Immigration Appeals Argued and Submitted September 6, 1983

Before: HUG and NELSON, Circuit Judges, and HOGGMAN,* District Judge.

HUG, Circuit Judge:

Hyun Joon Chung and Yang Ja Chung appeal the Board of Immigration Appeals' (BIA) order denying their applications for suspension of deportation. The BIA concluded that the Chungs had failed to

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*Honorable Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

show extreme hardship and that they did not merit a favorable exercise of administrative discretion. The Chungs also appeal the BIA's 1975 order denying their applications for adjustment of status under 8 C.F.R. 212.8(b)(4) as investors. The immigration and Naturalization Service (INS) contests this court's jurisdiction to review the earlier order.

FACTS

Mr. and Mrs. Chung were admitted to the United States as nonimmigrant treaty traders in 1968. In 1969, Mr. Chung applied for permanent resident status as a chemical engineer. The application was not supported by a valid labor certification and was denied. Mr. Chung then obtained employment as a chemical engineer and successfully moved to

reopen his application. While this motion was pending, in April, 1972, he applied for exemption from the labor certification requirements on the ground that he was an investor in a grocery business. On February 20, 1973, the District Director denied the application, finding that Mr. Chung had obtained his initial visa through misrepresentation and fradulent documentation.

In September, 1973, deportation proceedings were commenced. The Chungs conceded deportability but renewed their application for adjustment of status as investors. This application was also denied, and on August 27, 1975, the BIA dismissed the Chungs' appeal. The BIA found that Mr. Chung was not qualified for investor status because of his outside employment. The BIA also found that

Mrs. Chung had not carried her burden of proof in demonstrating the requisite degree of managerial responsibility over the business. The Chungs did not petition for judicial review of this decision but moved, instead, on February 11, 1976, to reopen the deportation proceedings to apply for suspension of deportation. This motion was denied on July 12, 1976. On January 10, 1977, the Chuungs moved for reconsideration of the motion to reopen. The BIA granted this motion on March 24, 1977, finding that the Chungs had made a prima facie showing of extreme hardship.

In subsequent hearings before an immigration judge, the Chungs presented medical evidence showing that Mrs.Chung periodically required surgery for a throad condition, and that laser surgery,

allegedly more effective than conventional treatment, was available in the United States but not in Korea. The Chungs presented testimony that their four United States citizen children would have difficulty adjusting to Korea school, language, and culture. They also presented evidence of their success in several business ventures. On February 26, 1982, the immigration judge denied the applications for suspension of deportation, finding that the Chungs had not established extreme hardship. He found that Mrs. Chung's medical condition was manageable with conventional surgical techniques available in Korea. He also found that deportation would not result in extreme hardship to the Chung's four children. Finally, he declined to exercise admi-

nistrative discretion in the Chung's favor, finding that they had engaged in a deceitful course of conduct to enter and remain in this country, that they had given false testimony, and that they had knowingly and persistently employed illegal alien in their home and business. The BIA dismissed their appeal of this decision, and the Chungs then filed a petition with this court, seeking review of both the denial of suspension and the earlier denial of adjustment of status.

A. Appellate Jurisdiction

In this appeal, the Chungs contest both the BIA's earlier ruling of 1975 refusing adjustment of status and the 1982 decision denying suspension of deportation. The INS challenges this court's jurisdiction to review the 1975 denial of adjustment of status, asser-

ting that the Chungs's petition was untimely.

Section 106(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a)(1), requires that a petition for review by this court be filed "not later than six months from the date of the final deportation order...." In Reyes v. INS, 571 F.2d 505(9th Cir. 1978), this court said that a "final order of deportation" under section 106(a) is one "which effectively terminates the proceeding." Id. at 507 (citing Foti v. INS, 375 U.S. 217,224 (1963)).

The BIA may reopen or reconsider a case in which it has rendered an order of deportation, either on its own motion or on the motion of the affected alien. 8 C.F.R. 3.2, 3.8(a). A motion to reopen and a motion to reconsider

distinct motions with different requirements. A motion to reopen must be based upon material evidence which was not available and could not have been discovered or presented by the alien at the prior hearing. 8 C.F.R. 3.2. A motion to reconsider "shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent." 8 C. F.R. 3.8(a). There is no requirement, however, of new facts or even new precedent, Chudshevid v. INS, 641 F.2d 780, 784 (9th Cir. 1981).

Where a motion to reopen is pending, "(t)here will be no order which terminates the proceedings until the motion to reopen is denied or the proceedings are reopened and concluded." Reyes, 571 F. 2d at 507. If the petitioner

chooses to file a motion to reopen before the BIA rather than a petition for judicial review within that six-months period, then a new six-month limitations period for judicial review does not begin until that motion is denied. Santiago v. INS, 526 F.2d 488, 489 n.3 (9th cir. 1975)(en banc), cert. denied, 425 U.S. 971 (1976). When an appeal is taken within that second six-month period, this court has jurisdiction to review both the denial of the motion to reopen and the original order of deporation. Bregman v. INS, 351 F. 2d 401, 402-03 (9th Cir. 1965). The same is true where the alien files a motion to reconsider before the BIA within six months of a final deportation order. When that motion is denied, the alien has six months within which

to file an appeal to this court; and both the denial of the motion to reconsider and the original order are reviewable. Chudshevid v. INS, 641 F.2d 780, 783-84 (9th Cir. 1981).

Thus it follows that where either a motion to reopen or a motion to reconsider has been filed, an otherwise final and appealable deportations order becomes no longer final, and no appeal can be taken to this court until the motion is denied or the proceedings have been effectively terminated. Accordingly, the limitations period does not run during this time. Rather, it begins anew when the motion has been denied or the further proceedings have been concluded and there is, consequently, a final deportation order once again. If a timely appeal is subsequ-

ently filed, both the original order and the later unfavorable ruling by the INS are reviewable. Compare Bregman, supra, (motion to reopen) and Chudshevid, supra, (motion to reconsider).

In this case, the BIA's denial of adjustment of status in 1975 was a final, appealable order of deportation. However, within six months of that order, the Chungs moved to reopen the proceedings on other grounds, making the original order no longer final. There was thus no final deportation order until the motion to reopen on other grounds was denied in July, 1976. The Chungs subsequently moved within six months to have the BIA reconsider its order denying their motion to reopen. The BIA chose to grant the motion to reconsider and conducted new administrative proceedings.

During the pendency of the new proceedings, a petition for judicial review by the Chungs could not have been based upon a final order. Unitl those administrative proceedings concluded on October 28, 1982, therefore, no "final order of deportation" existed under section 106(a). Since appellants' appeal to this court was filed within six months of that date, we hold that the BIA's original order denying adjustment of status in 1975 remains reviewable.

This result is in accord with the congressional objective in enacting section 106(a) to avoid successive, piecemeal appeals to this court. See Reyes, 571 F.2d at 507. As we noted in Yamada v. INS, 384 F.2d 214, 218 (9th Cir. 1967), "Congress visualized a single administrative proceeding in

which all questions relating to an alien's deportation would be raised and resolved, followed by a single petition in a court of appeals for judicial review..."

B. The Merits

With regard to the denial of adjustment of status, the Chungs assert that the BIA exercised its discretion based upon an erroneous standard. This agrument is without merit. The standard under which discretion is to be exercised is irrelevant, because the BIA's discretion was based not upon an exercise of discretion but upon a finding of statutory ineligibility. The BIA found that the Chungs had failed to prove that they were statutorily eligible for adjustment. This court's review of the BIA's decision is confined to

the bases upon which the BIA relied. See Ro v. INS 670 F.2d 114,116 (9th Cir. 1982).

The BIA found that Mr. Chung failed to show eligibility for investor status because of his concurrent employment in a field that would require a labor certification. This finding is supported by substantial evidence in the record and is a valid ground for denying an application for adjustment of status. See Cheung v. District Director, 641 F.2d 666, 668-69 (9th Cir. 1980). The BIA also found that Mrs. Chung had failed to prove that she exercised substantial responsibility over the direction and control of the grocery store. This finding, too, is supported by substantial evidence. The BIA thus did not abuse its discretion in denying the

Chungs' application for adjustment of status.

With regard to the denial of suspension of deportation, the scope of our review is narrow. This court may not substitute itw own interpretation of "extreme hardship" for the BIA's. INS v. Wang, 450 U.S. 139 (1981). Rather, the BIA's decision may be reversed only for an abuse of discretion, such as a failure to consider all relevant facts. Mejia-Carrillo v. INS, 665 F.2d 520,522 (9th Cir. 1981). In the present case the immigration judge's opinion, on which the BIA relies, gives serious consideration to all of the relevant facts, both adverse and ameliorating, with respect both to Mrs. Chung's health and to the welfare of the citizen children. Thus, we cannot say that the BIA abused

its discretion in finding that the Chungs were not statutorily qualified for suspension of deportation. The denial of discretionary relief likewise finds adequate support in the record.

AFFIRMED.

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Hyun Joon Chung and Yang Ja Chung,

Petitioners,

vs.

Immigration and Naturalization Service,

Respondent.

Before: HUG and NELSON, Circuit Judge, and HOFFMAN,* District Judge.

After due consideration, the penal as constituted in the above case has voted to permit the late filing of the petitioners' petition for rehearing and to deny the same. The petition for rehearing is hereby denied.

*Honorable Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

APPENDIX C

APPENDIX C

FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Amendment 5,

> No person shall be held to answer for a capital , or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

APPENDIX D

8 U.S.C. 1254(a)(1),

(a)As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and-

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this suspension; has been physically present in the United States for a continuous period of not less than seven years immediatly preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

APPENDIX E

APPENDIX E

PETITION FOR REHEARING

Petition is hereby made under Rule 40 of the Federal Rules of Appellete Procedure for rehearing in the above-entitled casue.

This petition is based upon petitioners' position that abuse of discretion, the correct standard of review in the proceeding, is apparent of the fact of the Immigration Judge's Written Decision and the affirming opinion of the Board of Immigration Appeals. This Court has misapplied itw own definition of abuse of discretion in reviewing the administrative proceedings below.

Abuse of discretion results when the Attorney General exercises discretion

in an "arbitrary, capricious, or illegal" manner. Astudillo v. INS 493 F. 525 (9th Cir. 1971). This is the correct standard for judicial review of denial of suspension of deportation where the Attorney General in his discretion finds that the "extreme hardship" requirement of the suspension statute has not been met. INS-vs-Wang, 450 U.S. 139 (1981)

After the ruling of Supreme Court in Wang, this Court has elaborated that abuse of discretion in such ases will result where the Attorney General's determination has been unduly influenced by factors tangential to statutory requirements of eligibility. Santana-Figueroa vs. INS, 644 F 2d 1354 (9th Cir. 1981).

In this case the aemliorative facts

in favor of a finding of hardship by the Attorney General consist of three United States children, one of whom was injured in an accident prior to the fact finding hearing, a serious medical condition of one of the respondents in the deportation proceedings, business and real estate holdings, and the inability of the children to speak their parents' native Korean language.

On the other hand, cited as adverse factual determinations were a course of deceitful conduct in gaining entry to the United States, the administrative hearing officer's impression that false testimony had been given by the Petitioners, and what is termed the "shaddy business" of employing illegal aliens in their businesses.

The abuse of discretion in the ultimate finding that extreme hardship would not result from deportation lies in the Attorney General's apparent obsession with adverse factors tangential to the clear statutory requirements of eligibility.

The basic requirements of Section 244 (1)(a) of the Immigration and Nationality Act are:

1. Consinuous physical presence in the United States for a least seven years prior to the date of application for relief.
2. Good moral character throughout such period.
3. An opinion of the Attorney General that deportation would result in extreme hardship to the alien

or members of his immediate family who are citizens or lawful permanent residence.

Petitioners submit tht the adverse findings of the Attorney General simply do not relate to such requirements of eligibility and are therefore tangential factors upon which the Attorney General not only rested his discretion upon unduly, but exclusively.

Concerning the finding that the Chungs conducted themselves deceitfully in order to gain initial entry into the United States, there is absolutely no nexus between such an issue and either their physical presence here in the United States or the hardship to be experienced by the family as a result of deportation. Arguably, such deceit

might relate to good moral character, but the clear language of statute mandates that it is only the moral character within the qualifying period that is to be examined. Clearly, any deceit on the part of the Chungs in the procurement of their non-immigrant visas used for initial entry is by statute invalidy considered by the Attorney General. It is worthy of note here, that the sufficient evidence of record cited by the administrative hearing officer consists of a written report of the American Counsel in Korea which was received in evidence and held to be sufficient despite denial of the Chungs' basic right of confrontation and cross-examination.

The second adverse factor cited

amounts to the Immigration Judge's finding that the Chungs consistently gave false testimony in the proceedings below. Nowhere in his decision does he specify any particular mistruth stated, except for a reference at page three (Written Decision of the Immigration Judge, A19-083-530 and A19-083-532, February 26, 1982) that the Chungs "had testified falsely with an intent to mislead me in regard to their investment."

Again, except as related to moral character, this finding is unrelated to the requirements of suspension of deportation. This is especially true since the only identifiable, false testimony relates to investments rather than to any issue relavant to suspension. Regarding moral character, if in fact any

statements relating to investments were not true, this might certainly reflect upon moral character, but should not necessarily be characterized as "consistent false testimony" as labeled in the Decision of the Immigration Judge (see page eitht of his Decision). The weight of an irrelevant false statement is certainly less than the weight of consistent false testimony.

The Administrative Procedure Act at 5 U.S.C. 557(c) requires that the decision of an administrative hearing officer "shall include a statement of findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." Petitioners submit that they have been denied a sufficient

statement of the reasons for the findings of the Immigration Judge that they had committed "consistent false testimony." Without being able to clearly identify the mistruths found by the Immigration Judge, petitioners must assume that he misinterpreted his role of fact finder by determining as mistruths testimony that he merely found less credible than other evidence.

Finally, the administrative determination cites the Chung's "shady business" of hiring illegal aliens. Petitioners submit that such an inquiry by the Immigration Judge is in itself prima facie abuse of discretion. Patently, this is wholly irrelevant to any legitimate factor in suspension of deportation. Further, at no time during these pro-

proceedings has there existed any law or rule requiring an employer to ascertain the immigration or employment status of a job applicant. The immigration Judge apparently based his conclusion that petitioners were engaged in a patter of business of hiring illegal aliens on his finding that certain previously apprehended workers were still on the jon some five months after arrest. There is no indication on th record that such workers were specifically prohibited from employment pending adjudication of their cases or whether petitioners received any formal order or even request to terminate employment. Petitioners contend that this entire area of questioning was inappropriate and beyond the scope of legitimate discretion

vested in the Attorney General.

In conclusion, petitioners submit that an abuse of discretion under the standard set forth by this Court in Santana-Figueroa exists in this case in that each cited adverse factor against exercise of discretion on behalf of petitioners has been improperly applied or considered by the Attorney General.

WHEREFORE, Petitioners respectfully request that this petition for rehearing be granted.

Dated: December 19, 1983

Respectflly submitted,

By_____
David Y. Kim
Attorney for Petitioners

83 - 1741

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HYUN JOON CHUNG and
YANG JA CHUNG,

Petitioners,

vs.

IMMIGRATION AND
NATURALIZATION SERVICE.

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(SUPPLEMENTAL APPENDIX)

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SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX

UNITED STATES DEPARTMENT OF JUSTOCE
UNITED STATES IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

WRITTEN DECISION
OF
THE IMMIGRATION JUDGE

On the basis of a showing that the respondents were the parents of three United States citizen children, one of whom was injured in an accident the year earlier, and that the female respondent needed medical attention that could only be furnished in the United States, the Board of Immigration Appeals on March 24, 1977 granted a motion for reconsideration and remaned this matter for consideration of respondent's application for suspension of deportation.

DISCUSSION AS TO ELIGIBILITY FOR SUSPENSION OF DEPORTATION:

Application for suspension of deportation under Section 244(a)(1) requires that the respondents establish their physical presence in the United States for a continuous period of not less than seven years preceding the submission of their applications, and that they have been persons of good moral character during this entire period and that their deportation would result in extreme hardship to themselves or to their children who are citizens of the United States. Suspension of deportation is a matter of administrative grace, not mere statutory eligibility. The burden of proof is upon the alien to establish not only that he meets all statutory requirements for eligibility, but that he is worthy of discretion in his favor. Moreover the exercise of discretion in a

particular case necessarily requires a consideration of all the facts and circumstances involved.

Respondents are husband and wife. Mr. Chung is 43 years of age and Mrs. Chung is 37 years old. They were both admitted to the United States in 1968 as non-immigrant treaty traders. There is sufficient evidence of record to support the Government's position that they were not entitled to treaty trader status at entry based upon fraudulent documents and misrepresentations made by Mr. Chung to the America Consul in Korea, Exhibit 10. On July 17, 1969, respondents applied for adjustment of status under Section 245 based upon Mr. Chung's claim that he was entitled to non-preference immigarant classification as a member of the professions entitled to a blanket

labor certification as a chemical engineer. On June 10, 1970, the application was denied administratively. After a denial of a motion to reconsider the Service instituted these deportation proceedings by the issuance of an Order to Show Casue on September 7, 1973, I denied respondent's applications for adjustment of status under Section 245, which was then based upon their claiming exemption from the alien labor certification requirements based upon an investment in a grocery store opened April 7, 1971, both as a matter of law and as a matter of discretion. I found that during the course of the deportation proceedings the respondents had testified falsely with an intent to mislead me in regard to their investment. I did however grant them the privilege of

voluntary departure until January 23, 1974. I should note that the record reflects that preparations for their entering business was started at least as early as January 28, 1971. On August 27, 1975, the Board dismissed their appeal, and on July 12, 1976, denied their motion to reopen suspension of deportation because they had not demonstrated that their deportation would result in extreme hardship to any qualifying individual. The Board considered evidence of the female respondent's medical condition which was diagnosed as "papilomatosis". On January 10, 1977 a motion to reconsider was filed with the Board containing addition medical reports regarding Mrs. Chung and one of their children. On March 24, 1977, the motion for reconsideration was granted.

At the remanded hearing Dr. Harvey Paley testified as Mrs. Chung's doctor and a specialist in throat conditions. He described Mrs. Chung's medical condition in layman's terms as the growth of benign lesions or warts in the voicebox and windpipe obstructing her breathing as well as causing her great difficulty in taling. He states that the condition could be fatal if not corrected. He used the new surgical procedure known as laser beam surgery to remove the warts on her voicebox and windpipe. Dr. Paley felt that this new treatment would cut down on the recurrance and severity of of the condition and is the best available treatment at this time. He further stated that the laser beam treatment was not available in Korea as far as he knew in February 1979 when he testified.

The normal treatment in cases similar to Mrs Chung's would be to go into the patient's throat and scrape or pluck the growth out but the growths would likely recur mor frequently. Dr. Paley's conclusion was that the treatment here was superior to treatment available in Korea. Mrs. Chung had been operated on at UCLA medical center using the normal surgical procedures in October 1975, Dr. Paley operated on Mrs. Chung on February 24, 1978, using the laser beam technology. Her examination on February 1, 1979, by Dr. Paley no papillome recurring in the voicebox but having recurred in the widpipe. She was again examined on July 22, 1980, the voicebox was still clear but surgery was needed on the windpipe. Exhibit 7. Dr. Paley was hopeful that further

surgery would clear the condition in the windpipe. He went on to state that there is no known cure for this disease. Respondents also claimed a hardship because of an automobile accident in wiich one of their children was severly injured in January 1976. No further evidence has been presented on his medical condition I assume therefore that he has been cured.

Respondents sold their grocery store not long after may denial and opened a sewing machine company called Hyjo Fashions Sewing Company. In January 1979 they were the site of an area control survey by immigration officers. Eleven of their fifteen employees were apprehended for being illegally in the United States. Respondents still own that

business and the male respondent since October 27, 1978, is a partner and owns 53% of Amko Engineering Company which does sub-contracting work for Hughes Aircraft and other defense contractors. He claims his interest is worth approximately $150,000.00. A report of investigation conducted June 25, 1979 indicated that 5 of the 11 arrested at Hyjo were still employed by the company. In addition, while conducting the background investigation it was ascertained that the respondents had employed an undocumented alien maid. I tried to ascertain during the course of these proceedings how the respondent as an illegal alien in the United States under deportation proceedings could obtain sub-contracting work from the

defense industry. I was not given further information on that point. In addition to their business interests the respondents own a home which they have an equity of at least $90,000.00 in. They have three United States citizen children. They claim the children do not speak Korea, although the official Korean interrupter was used during the course of these proceedings.

Extreme hardship is not a definable term of fixed and inflexible meaning. The elements to establish extreme hardship are dependent upon the facts and circumstances of each case. Among the factors to be considered are: the length of respondent's presence over the minimun requirements of seven years, respondent's age both at time of entry and at the time of application for relief,

the presence of United States citizen children, family ties, respondent's family ties outside the United States, the conditions in the country or countries to which the alien is returnable and the extent of respondent's ties to such countries, the financial impact of departure from this country, significant conditions of health particularly when tied to an unavailability of suitable medical care in the country to which respondent will return, significant and unusual community ties in this country, the possibility of other means of adjustment of status for future entry into this country. The significance of any specific consideration will of necessity be dependent upon the entire factual framework of the case in which it

arose and the presence or absence of one factor will ordinarily not be determinative. Urbano De Malaluan v. INS, 577 F. 2d 589 (9th Cir 1978). Matter of Anderson, 16 I&N Dec. 596. Recently the United States Supreme Court in considering Section 244, noted with favor the comments of Judge Goodwin of the United States Circuit of Appeals for the Ninth Circuit when he observed in a dissenting opinion to the Court's decision to reopen that "any foreign visitor who has fertility, money, and the ability to stay out of of trouble with the police for seven years can change his status from that of tourist or student to that of permanent resident without the inconvenience of immigrant v quotas. This stratedy is not fair to those waiting

for a quota, INS v. Wang, 101 S.CT. 1027. Subsequently on March 11, 1981, the United States Court of Appeals for the First Circuit supported the Board's determination that four children born while the respondent was knowingly in the United States illegally would be considered as an adverse factor. Vaughn v INS, -F.2d-(1st Cir. 1981). I find that the respondent have established their physical presence in the United States for the requisite perior of time. I further find that they have from the begining of their preparation to enter the United States up until the present time engaged in a course of conduct meant to deceive, to misrepresent, and to fabricate in order to enter the United States and to remain in this country by whatever means available. Respondents

have involved themselves in the shady business of employing illegal aliens and retaining those illegal aliens on thier payroll even after Service officers brought the situation to their attention. They have consistently given false testimony and have shown a creativity and ability to survive and to prosper so that I have no doubt that they could continue surviving and prospering were they be required to return to Korea. I am cognizant of the medical condition of Mrs. Chung; but it is managable and it can be controlled both by the new techniques of Dr. Paley and by the older techniques available in Korea. I find that their applications do not establish extreme hardship to themselves and I find that they have not

established extreme hardhip on the basis of their four United States children who were born after the respondent ware knowingly in this country illegally. I am sure the respondents will be very able to take care of these childrein in Korea.

The course of conduct that I have recited in this decision convinces me that as a matter of administrative discretion respondents should not be entitled to favorable administrative consideration.

ORDER: IT IS ORDERED that thier application for suspension of deportation be and the same are hereby denied.

Jay Segal
Immigration Judge

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